

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket 96-45
	)	
Blanca Telephone Company	)	
Seeking Relief from the June 22, 2016 Letter	)	
Issued by the Office of the Managing Director	)	
Demanding Repayment of a Universal Service	)	
Fund Debt Pursuant to the Debt Collection	)	
Improvement Act	)	

**SECOND ORDER ON RECONSIDERATION AND ORDER**

**Adopted: March 4, 2020**

**Released: March 5, 2020**

By the Commission:

**I. INTRODUCTION**

1. The Universal Service Fund's (USF) high-cost program supports the deployment of communications networks in high-cost, rural areas. As a rate-of-return incumbent local exchange carrier (incumbent LEC), Blanca Telephone Company (Blanca) is eligible to receive high-cost support based on the costs it incurred in providing rate-regulated local exchange telephone service in its designated study area. From 2005 to 2010, however, Blanca sought universal service support to cover not only such costs but also costs for providing non-regulated commercial mobile radio service (CMRS) both within and outside its study area. In 2012, the National Exchange Carrier Association (NECA) discovered Blanca's improper inclusion in its rate base of nonregulated costs and directed Blanca to correct its cost accounting. In 2016, the Commission's Office of the Managing Director (OMD) demanded that Blanca repay \$6,748,280 in high-cost universal service to which it was not entitled.<sup>1</sup> Blanca applied for review of that decision,<sup>2</sup> which the Commission upheld in the *Blanca Order*.<sup>3</sup>

2. In the Second Petition and Second Petition Supplement now before us (collectively, Amended Second Petition), Blanca seeks reconsideration of the *Blanca Order* as well as emergency relief from any withholding of universal service support payments otherwise payable to Blanca.<sup>4</sup> We dismiss

<sup>1</sup> Letter from Dana Shaffer, Deputy Managing Director, FCC Office of Managing Director to Alan Wehe, General Manager, Blanca Telephone Company (June 2, 2016) (Demand Letter).

<sup>2</sup> Emergency Application for Review, CC Docket No. 96-45 (filed June 16, 2016) (Application); Petition for Reconsideration, CC Docket No. 96-45 (filed June 24, 2016) (First Petition).

<sup>3</sup> *Blanca Telephone Company*, Memorandum Opinion and Order and Order on Reconsideration, 32 FCC Rcd 10594 (2017) (*Blanca Order*).

<sup>4</sup> Petition for Reconsideration and Emergency Request for Immediate 1.1910(b)(3)(i) Relief, CC Docket 96-45 (filed Dec. 29, 2017, erratum Jan. 5, 2018, erratum Jan. 8, 2018) (Second Petition), *as amended*, Motion for Leave to Supplement December 29, 2017 Petition for Reconsideration and Emergency Request for Immediate § 1.1910(b)(3)(i) Relief, CC Docket 96-45 (filed Jan. 8, 2018) (Second Petition Supplement). Although Blanca moved to have this supplement accepted, it was timely filed and accordingly, we will treat this supplement as an amendment to the Second Petition rather than as a separate filing.

the Amended Second Petition as procedurally defective and, in the alternative, independently deny it on the merits. Accordingly, Blanca must repay \$6,748,280, and Commission staff should pursue collection of that amount from Blanca, whether by offset, recoupment, referral of the debt to the United States Department of Treasury for further collection efforts, or by any other means authorized by law.<sup>5</sup>

## II. BACKGROUND

3. In 1997, pursuant to Section 254 of the Communications Act of 1934, as amended (Act),<sup>6</sup> the Colorado Public Utilities Commission (PUC) designated Blanca as an Eligible Telecommunications Carrier (ETC) in a study area comprised of parts of Alamosa and Costilla counties.<sup>7</sup> As a result, Blanca became eligible to receive high-cost USF support for providing local exchange telephone service in its designated study area.<sup>8</sup>

4. Pursuant to the Commission's rules in effect at the time, rate-of-return incumbent LECs designated as ETCs, like Blanca, received high-cost support based on their embedded costs in providing local exchange service to fixed locations in their high-cost areas.<sup>9</sup> Such support was intended to ensure the availability of basic telephone service at reasonable rates.<sup>10</sup> To that end, the Commission's accounting and cost allocation rules worked to ensure that incumbent LECs received a reasonable return on investment in the deployment and offering of supported services in high-cost areas within their respective study areas.<sup>11</sup> By limiting the availability of such support to a rate-of-return incumbent LEC's regulated costs within its study area, the accounting and cost allocation methods countered the incentive to engage in anticompetitive practices, such as predatory cross-subsidization, that might dampen competitive

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<sup>5</sup> See *Blanca Order*, 32 FCC Rcd at 10615-16, para. 54; Letter from Mark Stephens, Managing Director, Office of Managing Director, FCC, to Alan Wehe, General Manager, Blanca Telephone Company (Jan. 10, 2018) (Blanca Administrative Offset Notice) (notifying Blanca that the Commission "will pursue collection . . . by offset/recoupment of amounts otherwise payable to you," and that "as from the date of the [*Blanca Order*], . . . Blanca's monthly support from the Universal Service Fund will be offset/recouped against the Debt[] until the Debt is satisfied or until you have made acceptable arrangements for its satisfaction.").

<sup>6</sup> 47 U.S.C. § 254.

<sup>7</sup> See Commission Order Granting Application for Designation as an Eligible Telecommunications Carrier, Docket No. 97A-506T, Decision No. C97-1389, at 3, para. 2 (Colo. Utilities Comm'n Dec. 17, 1997); 47 U.S.C. § 254(e).

<sup>8</sup> A study area is a geographic segment in which an incumbent local exchange carrier is designated as an ETC. Such segment generally corresponds to the carrier's "entire service territory within a state." See *Petitions for Waivers Filed by San Carlos Apache Telecommunications Utility, Inc., & U S W. Communications, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 14591, 14592, para. 4 (AAD 1996).

<sup>9</sup> *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, Report and Order, 16 FCC Rcd 11244, 11248-49, paras. 8-10 (2001); see also *Special Access for Price Cap Local Exchange Carriers Order*, WC Docket No. 05-25, Report and Order, 27 FCC Rcd 10557, 10562, para. 8 (2012).

<sup>10</sup> 47 U.S.C. § 254(b)(3); see also, e.g., *Connect America Fund et al.*, WC Docket Nos. 10-90 et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4572, para 46 (2011).

<sup>11</sup> See *2000 Biennial Regulatory Review - Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers*, CC Docket Nos. 00-199 et al., Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19913, 19960-61, paras. 126-27 (2001) (modifying section 32.11 of the Commission's rules to make explicit that Part 32 accounting rules applied only to incumbent LECs, as that term is defined in section 251(h)(1) of the Act, and any other company deemed dominant); see also *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 4, para. 15 (1980) (explaining that dominant carriers have "substantial opportunity and incentive to subsidize the rates for [their] more competitive services with revenues obtained from [their] monopoly or near-monopoly services").

markets for other forms of communication technology.<sup>12</sup> As the Commission has explained, “[t]hese rules ensure that carriers compete fairly in nonregulated markets and that regulated ratepayers do not bear the risks and burdens of the carriers’ competitive, or nonregulated, ventures.”<sup>13</sup>

5. As a member of NECA, a membership organization of incumbent LECs, Blanca submits its cost information to NECA.<sup>14</sup> Pursuant to our rules, NECA is responsible for collecting its members’ cost study data and filer certifications of that data, and any other information necessary for NECA to calculate the amount of High-Cost Loop Support (HCLS), a subset of high-cost support, which its members are eligible to receive.<sup>15</sup> NECA submits the results of its calculations to the Universal Service Administrative Company (USAC), which is responsible for day-to-day administration of the high-cost support program.<sup>16</sup> In addition to the information it received from NECA, USAC collects carrier data and information relevant to the calculation of other forms of high-cost support.<sup>17</sup>

6. In addition to offering regulated wireline service within its study area, Blanca also offered CMRS, a nonregulated service, both within and outside its study area.<sup>18</sup> At least as of 2005, Blanca included the costs of this nonregulated service in the regulated cost accounts it submitted to NECA with respect to its designated study area.<sup>19</sup> By recording costs associated with both services as regulated costs between 2005 and 2010, Blanca received inflated amounts of high-cost support from the USF during this time frame.<sup>20</sup>

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<sup>12</sup> See *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539, 17550-51, para. 25 (1996) (explaining that the safeguards “were designed to keep incumbent local exchange carriers from imposing the costs and risks of their competitive ventures on interstate telephone ratepayers, and to ensure that interstate ratepayers share in the economies of scope realized by incumbent local exchange carriers”); see also *Policy & Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 2934, para. 117 (1989) (explaining that a “natural tension . . . exists between competition and rate of return, which surfaces in the practice of cost shifting, [and that] can be avoided through the use of incentive regulation, which blunts the incentives to shift costs from more competitive services to less competitive services”); *Verizon Commc’ns, Inc. v. Fed. Commc’ns Comm’n*, 535 U.S. 467, 487 (2002) (reciting history of various methods of regulating telecommunications rates and services and the sometimes perverse incentives arising therefrom).

<sup>13</sup> Wireline Competition Bureau Biennial Regulatory Review, WC Docket No. 04-179, Staff Report, 20 FCC Rcd 263, 318 (2005); See *Sandwich Isles Communications, Inc.*, WC Docket No. 10-90, Order, 31 FCC Rcd 12999, 13002, para. 8 (2016) (*Sandwich Isles Order*).

<sup>14</sup> Demand Letter at 2 (specifying that NECA initiated a “Loop” and “Non-Reg Review” focused on the underlying records for Blanca’s 2011 Cost Study in the area of non-regulated operations).

<sup>15</sup> See *Connect America Fund et al.*, WC Docket No. 10-90 et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4796, para. 476 (2011) (explaining that NECA collects data necessary for the calculation of HCLS while USAC administers other aspects of the fund, including identical support); 47 CFR §§ 36.611-613, 54.1305-1306 (detailing incumbent LEC submission of cost data to NECA), 54.1307 (detailing NECA’s submission of cost data to USAC); 54.707(b) (establishing USAC’s authority obtain all carrier submissions, and underlying information from NECA); see also *id.* § 69.601 *et seq.*

<sup>16</sup> See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal State Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Report and Order and Second Order on Reconsideration, 12 FCC Rcd 18400, 18412, para. 18 (1997).

<sup>17</sup> See 47 CFR §§ 36.611, 36.612, 54.307, 54.903; *High-Cost Universal Service Support et al.*, WC Docket No. 05-337 et al., Order, 23 FCC Rcd 8834, 8846, paras. 27-28 (2008).

<sup>18</sup> Demand Letter at 2.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> See *Blanca Order*, 32 FCC Rcd at 10600, para. 14.

7. In 2008, the Commission's Office of Inspector General (OIG) began an investigation into Blanca's receipt of high-cost support beginning with 2004. In 2012, during the pendency of the OIG investigation, and pursuant to its data reconciliation policies, NECA conducted a review of Blanca's 2011 Cost Study, and concluded that Blanca improperly included costs, loops, and revenues associated with providing CMRS in its 2011 Cost Study.<sup>21</sup> NECA directed Blanca to revise its 2011 Cost Study and all ensuing studies to remove such costs.<sup>22</sup> Meanwhile, based on its investigation and review of documentation provided by Blanca, OIG concluded that Blanca had misallocated costs and began working with USAC to identify the resulting USF losses in earlier years.<sup>23</sup>

8. Based on its analysis of information obtained during the OIG investigation and Blanca's own revisions to its cost studies and other filings, on June 2, 2016, OMD notified Blanca by letter that Blanca had violated Parts 36, 64, and 69 of the Commission's rules by incorrectly including in its calculation of costs eligible for high-cost support, costs of providing nonregulated cellular mobile telephone service and demanded immediate repayment of the \$6,748,280 that Blanca had improperly received.<sup>24</sup> On June 16, 2016, Blanca filed an Emergency Application for Review of the Demand Letter.<sup>25</sup> On June 24, 2016, Blanca filed a Petition for Reconsideration of the Demand Letter.<sup>26</sup> Blanca later filed four separate motions for leave to supplement its Application and Petition.<sup>27</sup>

9. In the *Blanca Order*, the Commission upheld OMD's determination that Blanca improperly received \$6,748,280 from the USF high-cost program between 2005-2010 by improperly including costs associated with its provision of an unregulated service, i.e., CMRS, in its regulated accounts.<sup>28</sup> The Commission also upheld OMD's separate and independent determination that Blanca improperly included costs for service outside of its study area.<sup>29</sup> The Commission made clear that Blanca's nonregulated costs are not eligible for high-cost support provided to an incumbent LEC nor was Blanca eligible for support for its CMRS offerings as a competitive ETC either inside or outside its study area.<sup>30</sup> The Commission also fully considered and rejected Blanca's arguments that the Commission does not have authority to seek repayment of improperly disbursed universal service funds<sup>31</sup> and that the question of whether Blanca intentionally misrepresented its costs or had "clean hands" was irrelevant to the issue of whether the Commission should seek to collect overpayments of USF support.<sup>32</sup> The

<sup>21</sup> See *id.*; see also Letter from Brandon Gardner, Manager, Member Services, NECA to Alan Wehe, Blanca Telephone Company (Jan. 28, 2013) (NECA True Up Notice) (citing NECA Cost Issue 4.9).

<sup>22</sup> See NECA True Up Notice.

<sup>23</sup> See Demand Letter at 1; see also 5 U.S.C. § App. 3 App.; *Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1116 (D.D.C. 1994) (concluding that, based on the legislative history of the Inspector General Act of 1978, "Congress understood the Act to give the Inspector General the authority to investigate the recipients of federal funds").

<sup>24</sup> Demand Letter.

<sup>25</sup> Application.

<sup>26</sup> First Petition.

<sup>27</sup> Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Dec. 19, 2016) (First Supplement); Second Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Mar. 30, 2017) (Second Supplement); Third Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Apr. 10, 2017) (Third Supplement); Fourth Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed July 5, 2017) (Fourth Supplement).

<sup>28</sup> See *Blanca Order*, 32 FCC Rcd at 10605-06, paras. 33-35.

<sup>29</sup> See *id.* at 10606-08, paras. 36-39.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 10609, para. 40.

<sup>32</sup> *Id.* at 10609, para. 41.

Commission also rejected Blanca's claims that it was not afforded due process.<sup>33</sup> The Commission further found that it has authority under the Debt Collection Improvement Act to collect a claim or to delegate authority to collect a claim to our managing director. In addition, the Commission granted Blanca's motion to accept two of four late-filed supplements (Second and Fourth Supplements) to the extent they raised new facts and arguments occurring after Blanca's deadline for appealing OMD's Demand Letter.<sup>34</sup> The Commission denied Blanca's motions to accept two other late-filed supplements (First and Third Supplements) for failing to demonstrate good cause for waiving the filing deadline.<sup>35</sup>

10. On December 29, 2017, Blanca filed its Second Petition. In this filing, Blanca argues that Blanca offered CMRS as a supported service;<sup>36</sup> that the Commission's efforts to recover high-cost universal service support Blanca improperly received is inequitable because Blanca purportedly had clean hands;<sup>37</sup> that the recovery effort is a penalty that the Commission can impose only pursuant to its forfeiture authority in Section 503 of the Act;<sup>38</sup> that the Commission is retroactively applying new rule interpretations and new recovery procedures in a way that interferes with Blanca's reasonable reliance interests;<sup>39</sup> that the Commission's recovery efforts deprive Blanca of due process by denying Blanca notice and a reasonable opportunity to contest the Commission's findings;<sup>40</sup> that the Commission lacks authority under the Debt Collection Improvement Act of 1996 to recover support wrongfully or erroneously paid;<sup>41</sup> and that the Commission has denied Blanca access to the records upon which it based its determination.<sup>42</sup>

11. Blanca also challenges the Commission's denial of its motion to submit its First Supplement.<sup>43</sup> Blanca claims that this denial amounts to a denial of its right to address "relevant Commission statements and rulings in 'real time,' as the Commission makes them" and requires Blanca to "divin[e]" how the Commission will apply precedent in future cases.<sup>44</sup> Blanca also asserts that the Commission's ordering clause dismissing its Second and Fourth Supplements is inconsistent with the acceptance of Blanca's Second and Fourth Supplements in the text.<sup>45</sup>

12. Blanca also seeks emergency relief from any change in its "red light status" and any withholding of support payments after the issuance of the *Blanca Order*.<sup>46</sup> Specifically, Blanca contends

<sup>33</sup> *Id.* at 10613-10614, paras. 47-50.

<sup>34</sup> *Id.* at 10603, para. 27; Second Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Mar. 30, 2017) (Second Supplement); Fourth Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 at 32 (filed July 5, 2017) (Fourth Supplement).

<sup>35</sup> *See Blanca Order*, 32 FCC Rcd at 10604, paras. 28-29; Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Dec. 19, 2016) (First Supplement); Third Motion for Leave to Supplement Emergency Application for Review, CC Docket No. 96-45 (filed Apr. 10, 2017) (Third Supplement).

<sup>36</sup> Second Petition at 10-11, 12-13, 16.

<sup>37</sup> *Id.* at 8, 10, 20-22.

<sup>38</sup> *Id.* at 4-10.

<sup>39</sup> *Id.* at 1-2, 4, 6, 10-17, 19-20.

<sup>40</sup> *Id.* at 6 n.5, 9.

<sup>41</sup> *Id.* at 17-19.

<sup>42</sup> *Id.* at 11 n.8.

<sup>43</sup> *Id.* at 3-4, 5, 23.

<sup>44</sup> *Id.* at 3-4, 5; *see also Blanca Order*, 32 FCC Rcd at 10604, para. 29.

<sup>45</sup> *Id.* at 22-23; *Blanca Order*, 32 FCC Rcd at 10603-04, 10616, paras. 27, 57.

<sup>46</sup> Second Petition at 6-7, 24 (Emergency Request). Delinquent debt owed to the Commission triggers the "red light rule," which places a hold on the processing of pending applications, fee offsets, and pending disbursement

(continued....)

that under the Commission's rules, the Commission cannot place Blanca in red light status or collect the outstanding debt pending resolution of its pending Second Petition and related appeals before the 10<sup>th</sup> Circuit Court of Appeals.<sup>47</sup> Accordingly, Blanca requests that it remain in green light status (and thus, be permitted to engage in business before the Commission); that the Commission grant its pending license assignment application; that the Commission direct USAC to make all USF payments pending appeal of its debt liability; and that the Commission direct USAC to pay any sums withheld as a consequence of the *Blanca Order*.<sup>48</sup>

13. On January 8, 2018, Blanca filed its Second Petition Supplement amending its Second Petition (together the Amended Second Petition).<sup>49</sup> In this filing, Blanca contends that the Commission uses more lenient procedures when investigating and recovering USF from larger corporations than when doing so from smaller corporations.<sup>50</sup> To support its argument, Blanca relies on five orders adopting negotiated settlements of forfeiture liability for violation of the Commission's Lifeline program rules (Lifeline consent decree orders) that the Commission released after Blanca's deadline for appealing the Demand Letter.<sup>51</sup> Blanca asserts that the Commission's actions in its case constitute disparate treatment that violates its "constitutional right to equal protection" and its "administrative right to similar treatment."<sup>52</sup> Blanca asserts that such disparate treatment is evidenced by the Commission's investigation of Blanca's reporting practices for a longer period of time; the failure of the Commission to issue a Notice of Apparent Liability for Forfeiture giving rise to an opportunity to settle liability; and the Commission's selective referral of Blanca's case to the Department of Justice for possible prosecution under the False Claims Act.<sup>53</sup>

14. Blanca further asserts that the Commission committed material error when it failed to consider an argument that the Commission's recovery efforts violate the terms of a 2013 settlement agreement it reached with NECA to resolve "accounting issues" pursuant to the NECA true-up process.<sup>54</sup> Blanca contends that the Commission may recover improperly paid universal service funds only through

(Continued from previous page) \_\_\_\_\_  
payments. 47 CFR §§ 1.1910, 1.1911, 1.1912; *see also Amendment of Parts 0 and 1 of the Commission's Rules*, MD Docket No. 02-339, Report and Order, 19 FCC Rcd 6540 (2004) (implementing Pub. L. No. 104-134, 110 Stat. 1321, 1358 (1996)).

<sup>47</sup> Second Petition at 24 (citing 47 CFR § 1.1910(b)(3)(i)).

<sup>48</sup> *Id.*

<sup>49</sup> Because it was filed within 30 days of public notice of the *Blanca Order*, the Second Petition Supplement was timely filed. *See* 47 CFR § 1.106(f).

<sup>50</sup> Second Petition Supplement at 1-5.

<sup>51</sup> *Id.* at 1 (citing *Cintex Wireless, LLC*, Order, 32 FCC Rcd 10920 (2017) (*Cintex Consent Decree*); *Easy Telephone Services*, Order, 32 FCC Rcd 10932 (2017) (*Easy Telephone Consent Decree*); *Global Connection Inc. of America*, Order, 32 FCC 10946 (2017) (*Global Connection Consent Decree*); *i-wireless, LLC*, Order and Consent Decree, 32 FCC Rcd 10960, 10960, para. 2 (2017) (*i-wireless Consent Decree*); *Telrite Corp.*, Order, 32 FCC Rcd 10974 (2017) (*Easy Telephone Consent Decree*)). Specifically, Blanca relies heavily on the separate opinions of then-Commissioner Clyburn, dissenting in part, in these decisions, in which she argues these orders represent an apparent bias in forfeiture prosecutions and related settlements in favor of "large, well-known corporations." *See id.*; *see, e.g., Cintex Consent Decree*, 32 FCC Rcd at 10931 (separate Statement of Commissioner Mignon L. Clyburn, Approving in Part and Dissenting in Part) (expressing concern that Enforcement Bureau bias in favor of large, well-known corporations has resulted in forfeitures and negotiated settlements that are a mere "slap on the wrist" and stressing the importance of having Commission rules "vigorously and fairly enforced").

<sup>52</sup> Second Petition Supplement at 1.

<sup>53</sup> *Id.* at 2-5.

<sup>54</sup> *Id.* at 5-6 (citing First Petition at 13 n.12, 15 & n.16).

one of two avenues: (1) pursuant to a forfeiture action where the overpayments result from rule violations, or (2) pursuant to the audit process, which is time-limited and “closes” upon settlement.<sup>55</sup>

15. On January 10, 2018, OMD issued a letter notifying Blanca that the Commission would begin recouping monies from Blanca’s monthly universal service support against the debt specified in the Demand Letter and upheld in the *Blanca Order*, until the debt is satisfied or until Blanca made acceptable arrangements for its satisfaction.<sup>56</sup> On January 12, 2018, Blanca responded to the Commission’s administrative offset notice, including in its response several arguments that are essentially identical to those raised in the Emergency Request.<sup>57</sup>

### III. DISCUSSION

16. In 2016, the Commission determined that Blanca received \$6,748,280 in high-cost universal service support between 2005 and 2010 to which it was not entitled and demanded that Blanca repay this sum.<sup>58</sup> In the intervening years, Blanca has made numerous filings, raising a myriad of procedural and substantive arguments. To date, while we have granted certain procedural requests, we have not found merit in any of Blanca’s substantive arguments. Today’s Order is no exception. In this Second Order, we dismiss as defective, and, in the alternative, we independently deny on the merits, Blanca’s Amended Second Petition.

17. Blanca seeks reconsideration of the *Blanca Order*, in which the Commission denied in part and dismissed in part Blanca’s Application and Petition (and four supplements). We find that Blanca’s Amended Second Petition is procedurally defective insofar as it fails to raise any arguments cognizable in a petition for reconsideration of the Commission’s prior order denying Blanca’s application for review. Namely, Blanca fails to show that the Commission made a material error or omission in the *Blanca Order* and has not raised additional material facts warranting reconsideration of the Commission’s findings. As an alternative and independent basis for our decision, we find the Amended Second Petition to be meritless.

#### A. The Amended Second Petition is Procedurally Defective

18. We dismiss Blanca’s Amended Second Petition as procedurally defective. Under section 405 of the Act, reconsideration of Commission orders is limited to “newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding.”<sup>59</sup> In turn, the Commission’s rules state that the Commission will entertain a petition for reconsideration of an order denying an application for review only if the petition relies on “facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission” or on facts or arguments unknown to the

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<sup>55</sup> *Id.* at 5-6, n.4 (asserting that “[t]here are no rule violation findings entered after an audit is settled,” that audit time frames and Commission review of audits are time limited and that “the auditing procedure the FCC discusses was concluded for Blanca years ago and the [*Blanca Order*] is unreasoned for failing to discuss this fact”).

<sup>56</sup> Letter from Mark Stephens, Managing Director, Office of Managing Director, FCC, to Alan Wehe, General Manager, Blanca Telephone Company (Jan. 10, 2018) (Administrative Offset Notice).

<sup>57</sup> Letter from Timothy E. Welch, Counsel for Blanca Telephone Company to Mark Stephens, Managing Director, FCC Office of Managing Director, CC Docket 96-45 (filed Jan. 12, 2018) (responding to the Commission’s administrative offset notice) (asserting that in changing Blanca’s red light status to green, the Commission acknowledged that Blanca’s debt was not delinquent and therefore, under section 1.1910(b)(3)(i) of the Commission’s rules, 47 CFR 1.1910(b)(3)(i), could not begin recoupment or otherwise begin collections toward satisfaction of such debt) (Administrative Offset Notice Response).

<sup>58</sup> See Demand Letter; *Blanca Order* at 10596, 1060508, paras. 2, 33-39.

<sup>59</sup> 47 U.S.C. § 405.

petitioner until after his last opportunity to present them to the Commission and that the petitioner “could not, through the exercise of ordinary diligence, have learned of the facts or arguments in question prior to such opportunity.”<sup>60</sup> These procedural requirements ensure that appealing parties will not use the reconsideration process to rehash and relitigate legal issues already raised (or that should have been raised) earlier in the same proceeding.<sup>61</sup>

19. The Amended Second Petition contains no facts or arguments that meet these requirements. Legal determinations and factual conclusions previously reached by the Commission in the same proceeding are not changed circumstances satisfying the requirements for appeal.<sup>62</sup> This is true even where the petitioner has embellished or expanded upon its original arguments by presenting additional supporting evidence in an attempt to reinforce its original contentions.<sup>63</sup> As the Commission has previously explained, “[n]ew facts that are not materially or significantly different from facts already before the Commission when it denied review raise matters that have already been fully considered.”<sup>64</sup>

20. Yet, much of Blanca’s Amended Second Petition is devoted to such claims. For example, the *Blanca Order* rejected Blanca’s argument that the adjudication and collection of this debt is a penalty—and yet Blanca tries to resuscitate it by pointing to a routine collection form issued after the release of the *Blanca Order*.<sup>65</sup> Notably, Blanca fails to explain the legal relevancy of the revised form given the information known to Blanca regarding the Commission’s practice of imposing administrative fees and penalties for delinquent debt payments.<sup>66</sup> As another example, the *Blanca Order* rejected Blanca’s argument that the debt collection was inequitable and a retroactive change in policy—and yet Blanca tries to vivify that claim by referencing questions in a 2009 subpoena issued by the FCC’s Inspector General.<sup>67</sup> Similarly, the *Blanca Order* rejected the claim that Blanca was entitled to receive identical support based on its CMRS offerings both within and outside of its study area—and yet Blanca tries to resurrect such claim (and more generally, its claim that it is entitled to the support received because its interpretation of its eligibility for support is reasonable) by making a series of arguments about

<sup>60</sup> See 47 CFR §§ 1.106(b)(2), 1.115(g) (slight variation in wording).

<sup>61</sup> See *Scott Malcolm Dsm Supply, LLC Somaticare, LLC, Order on Reconsideration*, 33 FCC Rcd 2410, 2412, para. 8 (2018) (explaining that “[n]either the Act nor Rules require the Commission to be administratively burdened by petitions for reconsideration that reargue issues that were already addressed, or that rely on facts or arguments that the petitioner could have—but did not—present to the Commission at an earlier stage”); *Holy Family Communications, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 15687, 15689-90, para. 6 (MB 2013) (“It is settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected, and reconsideration will not be granted merely for the purpose of again debating matters on which the Commission has already deliberated and decided.”).

<sup>62</sup> See *Shaw Communications, Inc.*, Order on Reconsideration, 27 FCC Rcd 6995, 6996, para. 4 (MB 2012) (“[T]he Commission’s rejection of a previously raised argument” does not satisfy the requirements of section 1.106(b)(2), “since of necessity the Commission’s order in any case will have been released after the aggrieved party was last able to present its arguments in pleadings.”); *M&M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, 5100, para. 6 (CCB 1987) (“The Commission’s disposition in a Review Order, of arguments raised in an Application for Review, does not constitute ‘changed circumstances’ pursuant to section 1.106(b)(2).”).

<sup>63</sup> See *Carolyn Hagedorn*, Memorandum Opinion and Order, 11 FCC Rcd 1695, 1696, para. 11 (1996) (finding that staff did not err in refusing to consider new facts in applicant’s petition for reconsideration, even when such facts arguably were an “expansion” of matters raised in initial application).

<sup>64</sup> *Skybridge Spectrum Foundation*, Memorandum Opinion and Order, 27 FCC Rcd 7701, 7703 & n.15 (2012).

<sup>65</sup> See Second Petition at 7, 19; *Blanca Order*, 32 FCC Rcd at 10611-13, para. 44-46.

<sup>66</sup> Compare, e.g., OMD Demand Letter at 7 (explaining that in the event of delinquency, the Commission may impose “administrative charges, interest, and penalties,” and a “penalty of six percent per annum”) with Second Petition, Attachment 00001, FCC Form 159-B (indicating penalty and administrative fee due).

<sup>67</sup> Second Petition at 20; *Blanca Order*, 32 FCC Rcd at 10607-608, paras. 38-39.

some regulations applying to CMRS services and about Blanca being a carrier of last resort.<sup>68</sup> We dismiss these and similar arguments as procedurally defective.

21. In its Amended Second Petition, Blanca also asserts that the Commission's ordering clause dismissing its Second and Fourth Supplements is inconsistent with the acceptance of Blanca's Second and Fourth Supplements in the text.<sup>69</sup> We disagree. The Commission made clear in its ordering clause that it was accepting Blanca motions to submit these supplemental pleadings only to the extent that they raised new facts and legal arguments not otherwise available to Blanca when its pleadings were originally due and otherwise denying these supplements.<sup>70</sup>

22. Blanca's attempts to revive the First and Third supplements are equally without merit. As the Commission explained, the Commission documents that Blanca sought to rely on in those supplements were based on long standing principles and precedent that "Blanca had ample opportunity to review and incorporate into its timely filed Application and Petition."<sup>71</sup> Blanca cannot escape dismissal by claiming (as it now does) that it should be allowed to address "relevant Commission statements and rulings in 'real time,' as the Commission makes them," regardless of whether the filing deadline for submitting an appeal has passed and regardless of whether such statements and rulings are derivative of prior precedent released before the filing deadline.<sup>72</sup>

23. Blanca also attempts to mischaracterize the Commission's procedural dismissal of its First Supplement as a substantive statement regarding the due process Blanca received and then to reintroduce dismissed arguments ostensibly as a rebuttal of the Commission's "conclusions."<sup>73</sup> Blanca asserts that in the *Blanca Order*, the Commission cited precedent that was either too old, i.e., "70-80 year old Supreme Court cases," or too recent, i.e., "FCC determinations made in 2011 & 2014 which were released after Blanca's 2005 to 2010 challenged conduct," to support its conclusion that Blanca had adequate notice, in 2005, of the Commission's position on whether a debt collection was a forfeiture action subject to a statute of limitations.<sup>74</sup> But the Commission had only cited such precedent indirectly, noting that such precedent was cited in Commission orders that Blanca itself had cited, to refute Blanca's contention that these orders introduced a novel interpretation of Commission collection authority that Blanca could not have reasonably challenged *before its July 5, 2016 filing deadline*.<sup>75</sup> The Commission

<sup>68</sup> Second Petition at 10-16; *Blanca Order*, 32 FCC Rcd at 10606-607, paras. 36-37.

<sup>69</sup> Second Petition at 22-23; *Blanca Order*, 32 FCC Rcd at 10603-04, para. 28.

<sup>70</sup> *Blanca Order*, 32 FCC Rcd at 10616, para. 57.

<sup>71</sup> *Id.* at 10604, 10604-05, para. 29 and 30-32.

<sup>72</sup> Second Petition at 3.

<sup>73</sup> See *id.* at 1-2 (arguing that in denying Blanca's motion to submit these filings after the 30 day deadline, the Commission "retroactively imposes the burden on Blanca in 2005 to guess what the FCC was going to say in 2016/2017 regarding USF rule violation proceedings based on what the FCC might subsequently view as 'long-standing' Supreme Court precedent"); *id.* at 4 ("The FCC tries to justify the lack of notice by asserting that prior to the release of the [*Blanca First Order*], there existed precedent from which Blanca could have understood what the Commission would do"); *id.* at 9 (asserting that the Commission's rejection of its late-filed First Supplement was an attempt to "explain what [the Commission] is doing to Blanca, but that explanation merely serves to highlight that the FCC is weaving a novel, generally applicable USF enforcement procedures out of whole cloth, on the fly and without notice").

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Blanca Order*, 32 FCC Rcd at 10604, para. 29 (citing *Network Services NAL*, 31 FCC Rcd at 12284, para. 144 & n.334 (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946); *United States v. Wurts*, 303 U.S. 414, 415-16 (1938)); *BellSouth*, 31 FCC Rcd at 8525, para. 71 & n. 150 (citing *Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting, LP et al.*, CC Docket No. 02-6, Order, 26 FCC Rcd 16586, 16600-01, para. 28 (2011); *Request for Waiver or Review of a Decision of the Universal* (continued....))

did not make a substantive determination in this context as to the notice that Blanca received based on this precedent.

24. Blanca introduces, for the first time in its Amended Second Petition, a new equal protection argument that attempts to rely on five recently released consent decrees with five carriers that received improper USF payments in connection with their provision of Lifeline services, a separate universal service program.<sup>76</sup> Blanca asserts it was treated with disfavor in comparison to these Lifeline carriers because of certain procedural differences in the investigation and collection of its debt and the pursuit of forfeiture liability against these Lifeline carriers. No doubt there were differences in how the Commission dealt with different carriers with different conduct in a different program and dealing with a different issue (the imposition of a penalty on top of the collection of improperly disbursed funds, which had already been recovered)—and all of these differences were readily apparent when the Commission in 2013 released the underlying notices of apparent liability against these carriers and the DOJ issued a Civil Investigation Demand indicating that the Commission had referred Blanca’s case for possible prosecution under the False Claims Act.<sup>77</sup> While new orders can represent new or changed circumstances or reveal heretofore unknowable facts, these consent decrees do neither; and, to the extent the dissent to the consent decrees to which Blanca cites identifies disparate treatment between those five carriers and unidentified other carriers as a potential legal argument, Blanca has failed to even allege that it was unable to discover any such disparate treatment prior to the release of the consent orders.<sup>78</sup> In the absence of such contention, this argument fails to meet our procedural rules and must be dismissed.

25. Nor can Blanca avoid dismissal by claiming (as it now does) that the Commission should have inferred alternative legal arguments from its prior filings. In making such contentions, Blanca is attempting to use its Amended Second Petition to introduce potential arguments that it abandoned or failed to articulate in its early pleadings, or that at best were contradicted by other arguments. With respect to the latter category, the Commission cannot be expected to parse through inconsistent positions that are not clearly pleaded in the alternative.<sup>79</sup> To constitute new facts under our procedural rules, “the failure to have the evidence placed before the agency in the original proceeding must be of ‘no fault’ of the petitioner.”<sup>80</sup> In circumstances where, as here, the petitioner has failed to clearly articulate its claims in the Application or First Petition, the petitioner assumes the risk that such claims will be precluded

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*Service Administrator by Premio Computer, Inc.*, CC Docket No. 02-6, Order, 29 FCC Rcd 8185, 8186, para. 6 & n.16 (WCB 2014)).

<sup>76</sup> See Second Petition Supplement at 1 (referencing *Cintex Consent Decree*, 32 FCC Rcd 10920; *Easy Telephone Consent Decree*, 32 FCC Rcd 10932; *Global Connection Consent Decree*, 32 FCC 10946; *i-Wireless Consent Decree*, 32 FCC Rcd 10960; *Telrite Consent Decree*, 32 FCC Rcd 10974).

<sup>77</sup> *Cintex Wireless, LLC*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17124 (2013); *Easy Telephone Services d/b/a Easy Wireless*, Notice of Apparent Liability, 28 FCC Rcd 14433, 14436, para. 8 (2013); *Global Connection Inc., of America d/b/a Stand Up Wireless*, Notice of Apparent Liability, 28 FCC Rcd 17116 (2013); *i-wireless, LLC*, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 15381 (2013); *Telrite Corporation d/b/a Life Wireless*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17108 (2013); First Petition at 38-39, Attach. 4 (DOJ Civil Investigation Demand, No. 14-57 (Jan. 30, 2014)).

<sup>78</sup> See *M & M Communications, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 5100, n.5 (CCB 1987) (dismissing newly raised equal protection argument as noncompliant with section 1.106(b)(2), where petitioner failed to argue that the facts underlying the assertion are a recent occurrence or newly discovered fact previously unknowable with reasonable due diligence).

<sup>79</sup> *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1461 (D.C. Cir. 1996) (finding that the party seeking review “seem[s] to abandon its argument . . . by taking inconsistent positions”).

<sup>80</sup> *AT&T Corp. v. FCC*, 363 F.3d 504, 509-10 (D.C. Cir. 2004) (quoting *ICC v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 279 (1987)).

under the Commission's administrative finality rules.<sup>81</sup> The Commission is not compelled—as Blanca now demands through its Amended Second Petition—to infer legal arguments that cannot be readily adduced or to marshal remote facts not specifically alleged in the Application or First Petition to support broad legal contentions.<sup>82</sup> Or to put it differently, the Commission is not required to make Blanca's case on its behalf.

26. For example, Blanca now points to language in the First Petition, claiming that the Commission should have ruled on whether Blanca's cellular offering should have been treated as a regulated service for cost-accounting purposes and should not have "abandon[ed]" the distinction drawn in the OMD Demand Letter between mobile and fixed service.<sup>83</sup> But that language did not argue that Blanca's wireless offering should be treated as regulated for cost accounting purposes. Instead, Blanca characterized its service as a mobile service (CMRS),<sup>84</sup> said that any analogy between its wireless offering and traditional local exchange service was a "red herring," and invited the Commission to discount any such analogy.<sup>85</sup> In other words, the *Blanca Order* correctly concluded, consistent with OMD's findings and Blanca's own characterization of its service, that Blanca's service was CMRS, a non-rate-regulated mobile service.<sup>86</sup>

27. For another example, in its Amended Second Petition, Blanca now claims that the Commission should have ruled on whether Blanca's 2013 true-up with NECA covering payments in the 2011-2013 period should have foreclosed collection of overpayments for earlier years (2005-2010) relating to the same flaws in reporting.<sup>87</sup> But in its First Petition, Blanca never made such an argument; instead, it discusses the NECA true up process only to argue that it was not an admission or concession of wrongdoing or debt liability.<sup>88</sup> As explained in the *Blanca Order*, NECA did not seek to recover past high-cost distributions from Blanca for the 2005-2010 period because NECA's cost pools operate within

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<sup>81</sup> *Time Warner Entertainment Center, LP v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998) (where issue is raised "in a less than complete way," the Commission is not afforded a fair opportunity to pass).

<sup>82</sup> See *FiberTower Spectrum Holdings, LLC v. FCC*, 782 F.3d 692, 696 (D.C. Cir. 2015); *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997); *Nw. Ind. Tel. Co. v. FCC*, 824 F.2d 1205, 1210, n.8 (D.C. Cir. 1987) (no fair opportunity to pass on argument where appellant "point[ed] out" a circumstance but did not make an argument based on such circumstance); see also, e.g., *Tama Radio Licenses of Tampa, Florida, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7588, 7589, para. 2 (2010) ("The Commission is not required to sift through an applicant's prior pleadings to supply the reasoning that our rules require to be provided in the application for review."); *Red Hot Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6745, n.63 (2004) ("Our rules do not allow for a 'kitchen sink' approach to an application for review, rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review.").

<sup>83</sup> See Second Petition at 10-11 (citing First Petition at 1, 3, 5, 11, n.10).

<sup>84</sup> *Blanca Order*, 32 FCC Rcd at 10605, n.83.

<sup>85</sup> See Application at 12 (explaining that Blanca retained the use of the "BETRS name merely for continuity purposes" and "at the end of the day the BETRS discussion is a red herring because USF funding is available for mobile cellular services – Blanca's description of the mobile cellular service is irrelevant and Blanca's use of the mobile system is irrelevant") & n.9 (asserting that "even if the Commission completely discounts" the analogy between its service and [Plain Old Telephone Service (POTS)], the Act and the Commission's rules specifically permit "USF recovery for mobile cellular systems").

<sup>86</sup> *Blanca Order*, 32 FCC Rcd at 10605, para. 34.

<sup>87</sup> See Second Petition Supplement at 2, 5-6 (citing First Petition at 13 n.12, 15 n.16).

<sup>88</sup> First Petition at 13 n.12, 15 n.16.

a 24-month settlement window.<sup>89</sup> And so this is a new argument that Blanca failed to timely raise and that the Commission must accordingly dismiss.<sup>90</sup>

28. In sum, Blanca has failed to meet the Commission's procedural requirements for reconsideration of the *Blanca Order*. None of the arguments that Blanca raises in its Amended Second Petition constitutes new facts or legal arguments that could not have been raised on or before the deadline for filing its First Petition. These arguments merely reiterate what Blanca originally asserted or contended in its First Petition, arguments that the Commission fully considered and rejected, or consist of arguments that could have been timely raised but were not. Accordingly, we dismiss Blanca's Amended Second Petition.

**B. The Amended Second Petition Is Meritless**

29. As an alternative and independent basis for rejecting Blanca's Amended Second Petition, we also find that Blanca's new arguments—like those previously raised and addressed in the *Blanca Order*—are meritless.

30. For example, and contrary to Blanca's contentions, its true-up with NECA in 2013 was not and could not be reasonably construed as a settlement of all potential liability to the government arising from cost accounting errors.<sup>91</sup> NECA is a private association of wireline carriers, not a government entity, and accordingly has no authority to compromise or waive any claims on behalf of the government.<sup>92</sup> Furthermore, NECA's direction to Blanca to revise its 2011 and 2012 cost studies does not speak to Blanca's responsibility for improper payments it obtained in earlier years or absolve Blanca of liability for those payments. In fact, when Blanca revised its cost studies, its contractual agreement with NECA specifically advised Blanca that Blanca remained responsible for any support adjustments outside NECA's two-year window.<sup>93</sup> In addition, the argument is foreclosed by the decision of the U.S. Court of Appeals for the 10<sup>th</sup> Circuit in *Farmers Telephone v. FCC*, which held that companies' reliance on NECA rules does not preclude the Commission from recovering all improper payments,<sup>94</sup> including payments outside NECA's two-year settlement window.<sup>95</sup>

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<sup>89</sup> Thus, this true-up process was limited, per a contractual arrangement with its members, to payments starting in 2011. See *Blanca Order*, 32 FCC Rcd at 10599-10600, n.37.

<sup>90</sup> See *GLH Communications, Inc.*, Order on Reconsideration, 33 FCC Rcd 5926, 5928-29, para. 8 & nn.27-28 (2018) ("We cannot allow [a party] to sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.") (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)), *aff'd*, 930 F.3d 449 (D.C. Cir. 2019).

<sup>91</sup> See Second Petition at 5-6 (stating that "Blanca settled its audit years ago") (citing First Petition at 13 n. 12, 15 & n.16) (all citations refer to the NECA true-up process); Second Petition Supplement at 5 (asserting that "Blanca settled its accounting matter with USAC years ago and the FCC's instant enforcement action breaches that settlement").

<sup>92</sup> Cf. *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999) (NECA "has no authority" to interpret FCC regulations because it "is neither an independent federal agency nor a subagency of the FCC.").

<sup>93</sup> *Blanca Order*, 32 FCC Rcd at 10559 & n.37 (2017); see NECA Pool Administration Procedures § 1.6.1, at 1-8 (2012) ("Any support adjustments accepted and processed by USAC corresponding to a company's data corrections outside of the 24-month settlement window become the obligation of the company."); *id.* § 2.1.4, at 2-3 ("While all data entry . . . is prohibited for months that have fallen out of the 24 month settlement window, adjustments to these months for other purposes (e.g. support fund true-ups) are performed to company settlements by NECA in order to comply with FCC rules.").

<sup>94</sup> *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250-52 (10th Cir. 1999).

<sup>95</sup> The case involved a 1997 order which found that NECA had misinterpreted an FCC regulation that took effect in 1993. See *id.* at 1243-47. NECA directed its members to correct their cost data, but only for a two-year window.  
(continued....)

31. Further, Blanca mischaracterizes the “history of cellular licensing” to support its contentions that its cellular service was both a “regulated” and/or “fixed” service and, therefore, that Blanca was entitled to the support it received.<sup>96</sup> Blanca asserts that, in its 1994 *Part 22 Rewrite Order*, the Commission adopted a proposal to eliminate the fixed service requirement for Basic Exchange Telephone Service (BETRS) (a regulated cellular service) in light of the Commission’s history of routine waiver of such requirement, and therefore, a mobile cellular service can be treated as a regulated service for cost accounting purposes.<sup>97</sup> Blanca further contends that the Commission “fixed” the service location of cellular mobile subscribers at the subscriber’s billing address.<sup>98</sup> Contrary to Blanca’s contentions, however, the *Part 22 Rewrite Order* only adopted a proposal to eliminate a prohibition on the offering of non-BETRS fixed service in cellular bands based in part, on the routine waiver of this prohibition in the past.<sup>99</sup> Likewise, the fact that the Commission defines a service location for CMRS providers offering competitive service in a LEC’s study area for purposes of the now defunct identical support program is irrelevant to the determination of whether a service is fixed and subject to rate regulation for purposes of cost accounting and the recovery of rate regulated support by an incumbent LEC within its study area. Despite Blanca’s arguments and as previously made clear in the *Blanca Order*, by definition, BETRS is a fixed service and CMRS is not.<sup>100</sup> BETRS is subject to Commission rate regulation and CMRS is not.<sup>101</sup>

32. Blanca also attempts to challenge these truisms by asserting that its CMRS resembles a fixed telecommunications service because Blanca offered its service as a common carrier subject to carrier of last resort obligations, charged prices for its service at rates equivalent to those set for wireline service under its tariff, and reported costs only from those subscribers that chose CMRS in lieu of landline service.<sup>102</sup> But, a carrier’s voluntary decision to offer CMRS service on terms defined by a tariff does not transform a mobile service into BETRS.<sup>103</sup> While Blanca acknowledges that states are preempted from setting rates for cellular service, Blanca alleges that it “regulated its own rates by offering

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*Id.* at 1246 & n.1. Yet the Commission went further and “required NECA to calculate and submit corrected data for each year in which NECA required its members to follow its faulty calculation.” *Id.* at 1250 & n.6 (emphasis added). The 10<sup>th</sup> Circuit Court upheld the Commission’s order in full.

<sup>96</sup> See Second Petition at 13.

<sup>97</sup> *Id.* (citing *Revision of Part 22 of the Commissioner’s Rules Governing the Public Mobile Services et al.*, Report and Order, 9 FCC Rcd 6513, 6571 (1994) (*Part 22 Rewrite Order*); *Revision of Part 22 of the Commissioner’s Rules Governing the Public Mobile Services et al.*, Notice of Proposed Rulemaking, 7 FCC Rcd 3658, 3672 (1992) (*Part 22 Rewrite NPRM*)).

<sup>98</sup> *Id.* at 12-13, 14 (citing 47 CFR § 54.307(b)).

<sup>99</sup> *Id.* at 13 (quoting *Revision of Part 22 of the Commissioner’s Rules Governing the Public Mobile Services et al.*, Notice of Proposed Rulemaking, 7 FCC Rcd 3658, 3672 (1992)); see *Revision of Part 22 of the Commissioner’s Rules Governing the Public Mobile Services et al.*, Report and Order, 9 FCC Rcd 6513, 6571 (1994) (eliminating restriction on the provision of incidental fixed service in cellular bands).

<sup>100</sup> See *Blanca Order*, 32 FCC Rcd at 10605 & n.84; see also, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1425, para. 38 (1994) (generally distinguishing mobile service “provided through dual-use equipment . . . capable of transmitting while the platform is moving” from services “provided to or from a transportable platform that cannot move when the communications service is offered,” and concluding that BETRS is not a mobile service) (*CMRS Second Report and Order*); *id.* at 1455, para.102 (finding that the Rural Radio Service, including BETRS, is a fixed service).

<sup>101</sup> See OMD Demand Letter at 3; *Blanca Order*, 32 FCC Rcd at 10605 & n.84.

<sup>102</sup> Second Petition at 11 (citing First Petition at 1-3, 5, 11, & nn.7, 10), 12 (citing First Petition at 4-5, 6-7, 17), 15.

<sup>103</sup> Blanca’s many citations to rules and related orders referring to cellular service as an eligible service do not pertain to rate-of-return high-cost universal service support, the kind of support Blanca received between 2005 and 2010. See Second Petition at 11-13.

cellular service under its state tariff” and notes that states may petition the FCC for rate regulation authority.<sup>104</sup> Blanca also alleges that it provides its service under NECA tariffs.<sup>105</sup> But CMRS is not eligible for inclusion under either state or federal tariffs, and thus, these tariffs have no bearing on whether a service is regulated for cost accounting purposes.<sup>106</sup> Moreover, the fact that cellular service is subject to regulations other than federal rate regulation has no bearing on whether the service is considered to be a rate-regulated service for cost accounting purposes.

33. Blanca also asserts that it was eligible to receive support for services provided outside of its designated study area because the Colorado Public Utility Commission (PUC) did not “strictly regulate telephone exchange service boundaries.”<sup>107</sup> Blanca suggests that because the Colorado PUC had not, prior to 2011, required an incumbent LEC to use a separate subsidiary to offer mobile service as a condition of receiving a competitive ETC designation, “Blanca’s service offering was properly structured.”<sup>108</sup> The issue of whether the Colorado PUC would have permitted Blanca to offer service outside of its designated service area as a competitive ETC had Blanca given the Colorado PUC the opportunity to evaluate its service offerings and certify Blanca as a competitive ETC, however, has nothing to do with Blanca’s eligibility under the Act and Commission’s rules as a designated ETC to receive USF support for such areas.<sup>109</sup> As explained in the *Blanca Order*, Blanca was required under the Act and the Commission’s rules to have been certified as an ETC in the relevant area in order to receive any support for such areas,<sup>110</sup> and Blanca does not challenge the Commission’s conclusion that it did not obtain such a certification.<sup>111</sup> Similarly, even if the Colorado PUC had designated Blanca as a

<sup>104</sup> See *id.* at 11 n.7, 12 (citing 47 U.S.C. § 201, 202, Part 20, Part 22). In many ways, this contention is merely a different reiteration of its previously raised and rejected argument that wireless services are regulated services.

<sup>105</sup> See *id.*

<sup>106</sup> 47 U.S.C. § 332(c)(3) (preempting state and local rate and entry regulation of CMRS unless certain conditions, not applicable here, are met); *CMRS Second Report and Order*, 9 FCC Red at 1478, 1479, paras. 173, 177 (finding that tariffs are “not essential to our ability to ensure that non-dominant carriers do not unjustly discriminate in their rates,” and forbearing from imposing section 203 tariff filing obligations on CMRS); 47 CFR § 20.15(c).

<sup>107</sup> Second Petition at 15-16 (arguing that “formal expansion of the Study Area is not required, because the goal is provision of service to rural, hard to serve subscribers ...”) (citing 47 CFR § 54.201(d)). See *Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services et al.*, Notice of Proposed Rulemaking, 7 FCC Red 3658, 3672 (1992).

<sup>108</sup> Second Petition at 15, n.10; see *Application of Union Telephone Company, dba Union Wireless, for Designation as an Eligible Telecommunications Carrier in Colorado*, Order Granting Exceptions, in Part, and Remanding with Directions, Colorado Public Utilities Commission, DA No. 09A-771T, at 13, paras. 29-30 (Colo. Pub. Utilities Comm’n rel. Apr. 26, 2011) (*Union Telephone Exceptions Order*).

<sup>109</sup> Second Petition at 15. Blanca quotes section 54.201(d) of the Commission’s rules as support for this contention, but we note that the quoted section merely requires ETCs to meet certain service obligations in their designated area. It does not create, as Blanca appears to argue, an open-ended eligibility for support in any area. 47 CFR § 54.201(d); 47 U.S.C. § 214(e)(5) (defining “service area” as a “geographic area established by a State commission (or the Commission under [section 214(e)(6)] for the purpose of determining universal service obligations and support mechanisms”).

<sup>110</sup> 47 U.S.C. §§ 214, 254; 47 CFR § 54.201.

<sup>111</sup> See *Blanca Order*, 32 FCC Red at 10607, paras. 36-37. We note that Blanca offers no evidence that the Colorado PUC had any opportunity to evaluate Blanca’s mobile offering as a separate and competitive service potentially eligible to receive service under the (now-defunct) identical support rule. The Commission had cited the 2011 Colorado PUC decision in the *Blanca Order* to illustrate the kinds of conditions the PUC might have imposed had it been properly informed that Blanca was offering a competitive CMRS offering. *Blanca Order*, 32 FCC Red at 10607 & n.94. For this reason, the decision further underscores the importance of preventing this kind of “comingling across regulated, unregulated, and deregulated operations.” *Union Telephone Exceptions Order* at 13, paras. 29-30.

competitive ETC in these areas and permitted Blanca to offer CMRS without use of a separate subsidiary, and even if Blanca had used shared infrastructure to provide both fixed wireless and mobile services—despite the Commission’s finding that “Blanca was providing only mobile cellular service” over its wireless infrastructure—Blanca would have been required by our accounting rules to divide shared costs between these services in order to determine how much support it was entitled to for offering regulated services as incumbent LEC and what it could receive as a competitive ETC.<sup>112</sup>

34. Blanca is also incorrect in its assertion that our authority to collect USF overpayments is limited to forfeiture actions or audit processes.<sup>113</sup> Rather, the Commission routinely resolves disputes regarding universal service mechanisms and payments through informal adjudication and collection procedures.<sup>114</sup> Throughout this proceeding, the Commission provided Blanca with notice, an opportunity to be heard, and an explanation for its decision: all the process to which Blanca is constitutionally and statutorily entitled.<sup>115</sup>

35. Contrary to Blanca’s contentions and as discussed at length in the *Blanca Order*, this debt collection action is not subject to special procedures in section 503 of the Act governing the Commission’s assessment of penalties.<sup>116</sup> The Commission is not imposing a penalty for Blanca’s erroneous cost accounting practices but “merely seeking to recover sums improperly paid” because of those practices.<sup>117</sup> In contrast, the December 2017 negotiated settlements that Blanca cites in its Amended Second Petition were assessing forfeiture penalties in connection with a wholly unrelated USF program (Lifeline) imposed *in addition to, and separate from*, the recovery of USF overpayments.<sup>118</sup> In each of these cases, unlike this one, USAC had already and separately “recovered the overpayments” sought by the Commission. Blanca’s apparent reliance on then-Commissioner Clyburn’s separate dissenting opinions in these cases is thus misplaced, since any supposed disparity in forfeiture penalties has no bearing on the investigation and collection of erroneously or wrongfully paid high-cost support where, as here, Blanca has resisted recovery of the overpayments and the Commission has not sought to assess any additional penalty or forfeiture.<sup>119</sup>

<sup>112</sup> See *Blanca Order*, 32 FCC Rcd at 10595-97, 10606, paras 4-5, 35; 47 CFR § 32.14(c).

<sup>113</sup> See Second Petition at 4-9; see also *Blanca Order*, 32 FCC Rcd at 10610-11, para. 42 (explaining that “[w]hen the Commission determines whether a specific set of USF payments is erroneous or illegal, it is making a fact-specific, individualized determination applying current laws to past conduct, i.e., an informal adjudication”); see also *id.* at 10611-13, paras. 43-46 (distinguishing such an action from a forfeiture action).

<sup>114</sup> See *Blanca Order*, 32 FCC Rcd at 10598-99, 10608, paras. 10-11, 39; see also 47 CFR Part 54 Subpt. I (providing for FCC review of USAC decisions); *id.* §§ 1.1901(e), 1.1911 (providing that the FCC may issue written demands for “amounts due the United States from ... overpayments”); see also *N.J. Coal. for Fair Broad. v. FCC*, 580 F.2d 617, 618-19 (D.C. Cir. 1978) (per curiam) (explaining that Section 503(b) gives the Commission authority in certain situations to assess a forfeiture penalty in addition to other available remedies).

<sup>115</sup> *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 653-55 (1990) (“[w]hen conducting informal adjudications, an agency need only comply with ‘the minimal requirements ... set forth in the APA, 5 U.S.C. § 555’”); *Riggins v. Goodman*, 572 F.3d 1101, 1110 (10th Cir. 2009) (“[D]ue process is required not before the initial decision or recommendation to terminate is made, but instead before the termination actually occurs.”).

<sup>116</sup> Second Petition at 4-10; *Blanca Order*, 32 FCC Rcd at 10610-13, paras. 42-46.

<sup>117</sup> See *Blanca Order*, 32 FCC Rcd at 10612, para. 45.

<sup>118</sup> See, e.g., *Cintex Wireless, LLC*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 17124, 17126 & n.21 (2013) (directing USAC, when it determines that an ETC has sought support from the Fund for an intra-company duplicate, to require the ETC to report to USAC *all months* when the ETC received duplicative support for each such subscriber and to recover all duplicative support received) (emphasis added); *id.* at 17130-31, para. 16 (stating that the penalties that result from the NAL are separate from any amounts that the ETC is required to pay by USAC to make the USF whole).

<sup>119</sup> See Second Petition Supplement at 1.

36. Finally, Blanca does not overcome the Commission’s determination in the *Blanca Order* that USF is a form of federal funding subject to the Debt Collection Improvement Act by referencing the inapposite appellate court decisions, *United States ex rel. Shupe v. Cisco Systems, Inc. and Farmers Tel. Co. v. FCC*.<sup>120</sup> We stress that *Shupe* addressed a materially different statute—“an outdated version” of the False Claims Act—not the federal debt collection laws.<sup>121</sup> *Shupe* held that statements made to USAC before 2009 did not implicate the amended False Claims Act because USAC is not the government itself (although it administers USF at the government’s direction) and because USF monies were not housed within the U.S. Treasury.<sup>122</sup> That holding has no bearing on this proceeding, which turns not on the False Claims Act, which addresses fraud claims, but instead on whether Blanca received over-payments.<sup>123</sup> Debts recoverable under the federal debt collection laws, in contrast to funds collected under the False Claims Act, are “not ‘limited to funds that are owed to the Treasury,’ but include[] all funds ‘owed the United States,’ including overpayments from any agency-administered program.”<sup>124</sup> Blanca cites *Farmers* for the proposition that NECA/USAC performs no adjudicatory or governmental functions, but, contrary to Blanca’s contention, this proposition does not mean that USF is not a federal program.<sup>125</sup> While USAC may handle day-to-day operations, the Commission is ultimately responsible for creating “specific, predictable, and sufficient . . . mechanisms to preserve and advance universal service,”<sup>126</sup> and “establish[ing] any necessary cost allocation rules, accounting safeguards, and guidelines.”<sup>127</sup> As stressed in the *Blanca Order*, both the United States Supreme Court and Congress have accordingly described universal service programs as providing “federal assistance” or “federal funds.”<sup>128</sup> The overpayments here are therefore recoverable as a debt owed to the United States under the federal debt collection laws.

<sup>120</sup> See Second Petition at 17 (citing *United States ex rel. Shupe v. Cisco Systems, Inc.*, 759 F.3d 379 (5th Cir. 2014) (per curiam); *Farmers Tel. Co. v. FCC*, 184 F.3d 1241, 1250 (10th Cir. 1999)). We note that these cases and the associated arguments were raised in Blanca’s late-filed First Supplement. See First Supplement at 15-16; *Blanca Order*, 32 FCC Rcd at 10604, para. 28 (denying Blanca’s motions to accept its late-filed First and Third Supplements).

<sup>121</sup> *Shupe*, 759 F.3d at 383 (citing 31 U.S.C. § 3729 (2008)). We note that contributions to the USF are now made to and housed within the U.S. Treasury and that payments made to USF recipients are now made from the U.S. Treasury. See <https://www.usac.org/cont/about/transfer-to-the-us-treasury.aspx>. See also *Blanca Order*, 32 FCC Rcd at 10614-10616, paras. 51-54.

<sup>122</sup> *Shupe*, 759 F.3d at 384-88.

<sup>123</sup> 31 U.S.C. § 3701(b)(1)(C); accord 47 CFR § 1.1901(e) (“debt” includes “amounts due the United States from . . . overpayments”).

<sup>124</sup> *Blanca Order*, 32 FCC Rcd at 10614, para. 51 (some internal quotation marks omitted). It has long been established that this provision extends to any program the government finances, *Adair v. Rose Law Firm*, 867 F. Supp. 1111, 1115 (D.D.C. 1994), and Congress did nothing to disturb that interpretation when it amended the federal debt collection laws in 1996.

<sup>125</sup> See Second Petition at 17-18 (citing *Farmers*, 184 F.3d at 1250).

<sup>126</sup> 47 U.S.C. § 254(b)(5).

<sup>127</sup> *Id.* § 254(k). USAC has no control over how these funds are used but instead must collect and disburse them according to specific rules established by the FCC. See 47 CFR § 54.702(c) (providing that USAC “may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress,” and “[w]here the Act or the Commission’s rules are unclear, or do not address a particular situation, [USAC] shall seek guidance from the Commission”).

<sup>128</sup> *Blanca Order*, 32 FCC Rcd at 10614, para. 51 & n.148.

**C. Blanca's Emergency Request Is Procedurally Defective and Meritless**

37. We separately dismiss Blanca's Emergency Request for stay of a Commission order.<sup>129</sup> Under the Commission's rules, such a request must be filed as a separate pleading.<sup>130</sup> Blanca filed its request as part of its petition for reconsideration, so we dismiss this request as procedurally defective.<sup>131</sup>

38. Nor are we obligated to treat Blanca's Response to the Administrative Offset Notice as a separate request for stay simply because Blanca raised several arguments in its response challenging the timing of the collection as well as the collection itself, many of which Blanca had raised in its Amended Second Petition.<sup>132</sup> As already explained by the 10th Circuit Court of Appeals, the Commission's Administrative Offset Notice merely informed Blanca of the Commission's intent to pursue recoupment in accordance with its findings in the *Blanca Order* and the debt collection practices described in the Demand Letter.<sup>133</sup> Because the Administrative Offset Notice did not create legal obligations or impose legal consequences, there was nothing to stay as a consequence of this notice.

39. We also reject Blanca's Emergency requests (and similar arguments in the Response to the Notice of Administrative Offset) on the merits. Blanca seeks to stay the Commission's determination that the improper USF payments constitute a debt owed to the United States and its instruction to staff to pursue collection of the unpaid debt, arguing that it is entitled to such stay during the pendency of its agency or judicial appeals under the Commission's rules.<sup>134</sup> We reject that request for several reasons. *For one*, the rule cited only suspends application of the Commission's red light rule, which as noted above Blanca has since recognized has already been suspended. Thus, the rule has not prevented prosecution of any pending applications by Blanca,<sup>135</sup> or receipt by Blanca of credit for monthly payments due from the USF fund. We note that the rule offers no relief from other consequences of debt incurrence, including the administrative offset of future USF payments in accordance with the Commission's rules and the Debt Collection Improvement Act, after having accorded Blanca notice and an opportunity for review within the Commission of the determination of indebtedness.<sup>136</sup> *For another*, a petitioner must show good cause for a stay,<sup>137</sup> and Blanca's filing does not even attempt to show that it

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<sup>129</sup> Second Petition at 8.

<sup>130</sup> 47 CFR § 1.44(e).

<sup>131</sup> In addition, to the extent the Emergency Request seeks suspension of Blanca's red light status, the request is dismissed as moot. As Blanca has since recognized, its red light status was suspended on or about January 9, 2018. Motion for Immediate Action on Petition for Reconsideration and Emergency Request for Immediate § 1.1910(b)(3)(i) Relief at 5 n.10 & attachment p. 00003 (filed Nov. 25, 2019) (Motion for Immediate Action); Administrative Offset Notice Response at 2.

<sup>132</sup> See Response to Administrative Offset at 2 (referencing argument in its Emergency Request that under section 1.910(b)(3)(i) of the Commission's rules, the Commission cannot pursue collection of a debt during the pendency of an agency or judicial appeals); Second Petition at 24.

<sup>133</sup> *Blanca Tel. Co. v. FCC*, Case No. 18-9502, Order, at 2, n.1 (10th Cir. Oct. 25, 2018) (determining that the Blanca Administrative Office Notice did not constitute reviewable agency action).

<sup>134</sup> See Second Petition at 28; 47 CFR § 1.1910(b)(3)(i); see also Administrative Offset Notice Response at 1-2.

<sup>135</sup> In its Second Petition, Blanca expresses concern that its application to assign a license has not been processed or granted. Second Petition at 24. These delays are not associated with Blanca's red light status, which as noted above, has been suspended.

<sup>136</sup> See 31 U.S.C. § 3716; 47 CFR §§ 1.1911 *et seq.* Wholly apart from its remedies under the Debt Collection Improvement Act, "[t]he government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'" *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947); accord, *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1112 (D.C. Cir. 1988).

<sup>137</sup> 47 CFR § 1.106(n).

has satisfied the traditional four-factor test for demonstrating such good cause.<sup>138</sup> We note that similar requests by Blanca to stay the *Blanca Order* have already been denied by the 10<sup>th</sup> Circuit Court of Appeals.<sup>139</sup>

40. For all these reasons, the *Blanca Order* and subsequent collection efforts remain in effect.<sup>140</sup>

#### IV. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 214, 254, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 214, 254, 405, and sections 1.106 and 1.115 of the Commission's rules, 47 CFR §§ 1.106, 1.115, the Amended Second Petition is hereby DISMISSED, or alternatively, DENIED.

42. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 5, 214, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 155, 214, 254, and sections 1.43 and 1.44 of the Commission's rules, 47 CFR §§ 1.43, 1.44, that the Emergency Request is DISMISSED, or alternatively, DENIED.

43. IT IS FURTHER ORDERED that the Motion for Immediate Action is DISMISSED AS MOOT.

44. IT IS FURTHER ORDERED that a copy of this Order on Reconsideration shall be sent by first class mail and certified mail, return receipt requested, to Blanca Telephone Company's attorney, Timothy E. Welch, Hill and Welch, 1116 Heartfields Drive, Silver Spring, MD 20904.

45. IT IS FURTHER ORDERED that, pursuant to section 1.103 of the Commission's rules, 47 CFR § 1.103, this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

<sup>138</sup> See, e.g., *Rural Call Completion*, Third Report and Order and Order, 33 FCC Rcd 8400, 8417, para. 47 & n.155 (2018) (*Rural Call Completion Order*). See also *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Pursuant to this standard, the movant must show that (1) it is likely that it will prevail on the merits; (2) that it will suffer irreparable harm absent grant of the preliminary relief; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest would favor the grant. *Rural Call Completion Order*, 33 FCC Rcd at 8417, para. 47.

<sup>139</sup> *Blanca Tel. Co. v. FCC*, Case No. 17-1451, Order (10th Cir. Dec. 29, 2017) (denying motion for stay pending appeal); *Blanca Tel. Co. v. FCC*, Case No. 18-9502, Order (10th Cir. Apr. 5, 2018) (denying motion for injunction pending appeal).

<sup>140</sup> Based on action taken in this order, we dismiss as moot Blanca's recent Motion for Immediate Action.